

AMENDED IN SENATE APRIL 17, 2006

**SENATE BILL**

**No. 1544**

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**Introduced by Senator Migden**  
(Coauthor: Assembly Member Goldberg)

February 23, 2006

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An act to add Section 806 to the Evidence Code and to add Sections 686.3 and 13519.10 to the Penal Code, relating to criminal investigations.

LEGISLATIVE COUNSEL'S DIGEST

SB 1544, as amended, Migden. Criminal investigations: eyewitness identification: lineups.

Existing law does not regulate how law enforcement officials prepare or conduct eyewitness photo or live lineup identifications.

This bill declares legislative intent to require law enforcement to adopt policies and procedures regulating eyewitness lineup identifications so as to ensure a decrease in the number of misidentifications.

*This bill would require all law enforcement agencies to develop regulations to be followed by their peace officers in order to ensure the reliability of eyewitness photo and live identifications, as specified. This bill would also require the Commission on Peace Officer Standards and Training to train all peace officers on the specified regulations to ensure accurate and reliable eyewitness identifications.*

*Existing law allows opinion testimony from expert witnesses to be admitted at trial upon specified showings.*

*This bill would allow expert testimony regarding the reliability of an eyewitness identification to be admitted at trial.*

*Because this bill requires local agencies to adopt new regulations and to train their employees regarding the regulations, it would impose a state-mandated local program.*

*The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.*

*This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.*

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.  
State-mandated local program: ~~no~~-yes.

*The people of the State of California do enact as follows:*

- 1     SECTION 1. The Legislature finds and declares the
- 2     following:
- 3     (a) The goal of a law enforcement criminal investigation is to
- 4     find and apprehend the person or persons responsible for
- 5     committing a crime.
- 6     (b) Eyewitness identification procedure studies indicate that
- 7     the criminal justice system can significantly decrease the rate of
- 8     erroneous eyewitness identifications by implementing changes to
- 9     identification procedures.
- 10    (c) A decrease in the number of erroneous eyewitness
- 11    identifications will increase public trust in the criminal justice
- 12    system, which, in turn, will increase the ability of law
- 13    enforcement and prosecutors to convict the guilty and protect our
- 14    communities.
- 15    (d) New policies and procedures such as those recommended
- 16    by the National Institute of Justice are readily available and have
- 17    proven effective in other jurisdictions.
- 18    (e) Therefore, it is the intent of the Legislature that law
- 19    enforcement officials establish new policies and procedures
- 20    similar to those recommended by the National Institute of Justice
- 21    in order to ensure that eyewitness identification procedures in
- 22    California minimize the chance of misidentification of a suspect.
- 23    SEC. 2. Section 806 is added to the Evidence Code, to read:

1     806. *Expert testimony is admissible regarding factors that*  
2 *affect the reliability of eyewitness identifications, including*  
3 *factors present in the particular case.*

4     SEC. 3. *Section 686.3 is added to the Penal Code, to read:*

5     686.3. (a) *All law enforcement agencies, including, but not*  
6 *limited to, municipal and state police departments, sheriffs, and*  
7 *prosecutors, shall adopt regulations for conducting photo and*  
8 *live lineups with eyewitnesses. The regulations shall be*  
9 *developed to ensure reliable and accurate suspect identifications.*  
10 *In order to ensure reliability and accuracy, the regulations shall*  
11 *comply with, at a minimum, the following requirements:*

12     (1) *Prior to conducting the identification procedure, and as*  
13 *close in time to the incident as possible, the eyewitness shall*  
14 *complete a standardized form describing the perpetrator of the*  
15 *offense.*

16     (2) *The investigator conducting the identification procedure*  
17 *shall be a person who is not aware of which person in the*  
18 *identification procedure is suspected as the perpetrator of the*  
19 *offense.*

20     (A) *Individuals and photos used in an identification procedure*  
21 *shall be presented sequentially, not simultaneously. However,*  
22 *when it is not practicable for the investigator to be a person who*  
23 *is not aware of which person in the identification procedure is*  
24 *suspected as the perpetrator of the offense, then the following*  
25 *shall apply:*

26     (i) *The lineup will be presented simultaneously, not*  
27 *sequentially.*

28     (ii) *The investigator will state in writing the reason that the*  
29 *presentation of the lineup was not made by a person who was not*  
30 *aware of which person in the identification procedure was*  
31 *suspected as the perpetrator of the offense.*

32     (3) *An eyewitness shall be instructed of the following, prior to*  
33 *any identification procedure:*

34     (A) *The perpetrator may not be among the persons in*  
35 *identification procedure.*

36     (B) *The eyewitness should not feel compelled to make an*  
37 *identification.*

38     (C) *An identification or failure to make an identification will*  
39 *not end the investigation.*

1     (4) *If the identification procedure is being done sequentially,*  
2 *rather than simultaneously, then, prior to the identification*  
3 *procedure, an eyewitness shall also be instructed of all of the*  
4 *following:*

5     (A) *Each photograph or person shall be viewed one at a time.*

6     (B) *The photographs or persons shall be displayed in random*  
7 *order.*

8     (C) *The photographs will be presented in shuffled envelopes.*

9     (D) *The eyewitness should take as much time as needed in*  
10 *making a decision about each photograph or person before*  
11 *moving to the next one.*

12     (E) *All photographs or persons will be shown to the*  
13 *eyewitness, even if an identification is made before all have been*  
14 *viewed.*

15     (5) *An identification procedure shall be composed so that the*  
16 *fillers generally fit the description of the person suspected as the*  
17 *perpetrator and, in the case of a photo lineup, the photograph of*  
18 *the person suspected as the perpetrator should resemble his or*  
19 *her appearance at the time of the offense and does not unduly*  
20 *stand out.*

21     (6) *If the eyewitness has previously viewed an identification*  
22 *procedure in connection with the identification of another person*  
23 *suspected of involvement in the offense, the fillers in the lineup in*  
24 *which the person suspected as the perpetrator participates shall*  
25 *be different from the fillers used in any prior lineups.*

26     (7) *At least eight fillers shall be included in a photo lineup and*  
27 *at least four fillers shall be included in a live lineup, in addition*  
28 *to the person suspected as the perpetrator.*

29     (8) *In a photo lineup, no writings or information concerning*  
30 *any previous arrest of the person suspected as the perpetrator*  
31 *shall be visible to the eyewitness.*

32     (9) *In a live lineup, any identification actions, such as*  
33 *speaking or making gestures or other movements, shall be*  
34 *performed by all lineup participants.*

35     (10) *All live lineup participants shall be out of the view of the*  
36 *eyewitness prior to the beginning of the identification procedure.*

37     (11) *Only one suspected perpetrator shall be included in any*  
38 *identification procedure.*

39     (12) *All witnesses shall be separated when viewing an*  
40 *identification procedure.*

1     (13) Nothing shall be said to the eyewitness regarding the  
2     position of the person suspected as the perpetrator during the  
3     identification procedure.

4     (14) Nothing shall be said to the eyewitness that might  
5     influence the eyewitness's selection of the person suspected as  
6     the perpetrator.

7     (15) If the eyewitness identifies a person he or she believes to  
8     be the perpetrator, all of the following shall apply:

9     (A) The investigator shall immediately inquire as to the  
10    eyewitness's confidence level in the accuracy of the  
11    identification.

12    (B) No information concerning the identified person shall be  
13    given to the eyewitness prior to obtaining the eyewitness's  
14    statement of confidence level.

15    (16) A written record of the identification procedure shall be  
16    made that includes, at a minimum, all of the following:

17    (A) All identification and nonidentification results obtained  
18    during the identification procedure, signed by the eyewitness.

19    (B) A statement of the eyewitness's own words regarding how  
20    certain he or she is regarding the accuracy of his or her  
21    identification, signed by the eyewitness.

22    (C) The names of all persons present at the identification  
23    procedure.

24    (D) The date, time, and location of the identification  
25    procedure.

26    (E) If the identification procedure was conducted sequentially,  
27    the order in which the photographs or persons were displayed to  
28    the eyewitness.

29    (F) Color copies of all photographs used in a photo lineup.

30    (G) Identification information and the sources of all  
31    photographs used in a photo lineup.

32    (H) An electronic recording that includes both audio and  
33    visual representations of the identification procedures that  
34    includes all persons who participated in the live lineup and the  
35    reactions of the witnesses and the statements of the investigator.

36    (b) (1) Field show-ups of a suspect are unnecessarily  
37    suggestive and are disallowed, except under any of the following  
38    circumstances:

39    (A) The witness is gravely injured and may not survive to  
40    participate in an alternative procedure.

1 (B) (i) *There is no probable cause for arrest without a field*  
2 *show-up identification and only a single witness will be making*  
3 *the identification.*

4 (ii) *There is no probable cause for arrest without a field*  
5 *show-up identification and there are multiple witnesses, however*  
6 *each witness shall be shown the suspect separately. The field*  
7 *show-up shall cease when the first identification is made by a*  
8 *witness. All other identification procedures must be in*  
9 *compliance with subdivision (a) of this section.*

10 (iii) *If there is no probable cause for arrest without a field*  
11 *show-up identification, the suspect shall be given the opportunity*  
12 *to waive probable cause for the arrest and accept a prompt*  
13 *identification procedure in compliance with this statute in lieu of*  
14 *a field show-up. Evidence of the waiver is inadmissible and shall*  
15 *be immune from prosecutorial comment.*

16 (2) *Whenever practicable and safe, during a field show-up a*  
17 *witness should view the suspect while the suspect is not*  
18 *restrained by handcuffs or an officer and while the suspect is not*  
19 *seated in the squad car.*

20 (3) *A field show-up shall be electronically recorded, unless it*  
21 *is shown to have been impracticable.*

22 (4) *During the field show-up, the eyewitness must make a*  
23 *contemporaneous signed statement or electronic recording*  
24 *regarding any identification.*

25 (c) *For purposes of this section, the following terms have the*  
26 *following meanings:*

27 (1) *“Eyewitness” means a person whose identification of*  
28 *another person may be relevant in a criminal investigation.*

29 (2) *“Photo lineup” means a procedure in which an array of*  
30 *photographs, including a photograph of the person suspected as*  
31 *the perpetrator of an offense and additional photographs of other*  
32 *persons not suspected of the offense, is displayed to an*  
33 *eyewitness for the purpose of determining whether the eyewitness*  
34 *is able to identify the suspect as the perpetrator.*

35 (3) *“Live lineup” means a procedure in which a group of*  
36 *persons, including the person suspected as the perpetrator of an*  
37 *offense and other persons not suspected of the offense, is*  
38 *displayed to an eyewitness for the purpose of determining*  
39 *whether the eyewitness is able to identify the suspect as the*  
40 *perpetrator.*

1 (4) “Investigator” means the person conducting the live or  
2 photo lineup.

3 (5) “Identification procedure” means either a photo lineup or  
4 a live lineup.

5 (6) “Filler” means either a person or a photograph of a  
6 person who is not suspected of an offense and is included in an  
7 identification procedure.

8 (7) A field show-up means a presentation of a single suspect to  
9 a witness or witnesses.

10 (d) When an identification procedure is composed or  
11 conducted in violation any of the provisions of this statute, the  
12 admissibility of the eyewitness identification shall be presumed to  
13 create a danger of undue prejudice.

14 (1) If the eyewitness identification is admitted by the trial  
15 court, the court shall give the jury a limiting instruction  
16 regarding the reliability of the identification substantially similar  
17 to the following:

18 (2) Specific procedures are in place to increase the reliability  
19 of eyewitness identifications; jurors may consider evidence that  
20 police officers did not follow such procedures or failed to adopt  
21 such procedures when determining whether an eyewitness was  
22 mistaken in identifying the defendant as the perpetrator.

23 SEC. 4. Section 13519.10 is added to the Penal Code, to  
24 read:

25 13519.10. The Commission on Peace Officer Standards and  
26 Training shall implement, on or before July 1, 2007, a course or  
27 courses of instruction for the required training of all peace  
28 officers on the methods and technical aspects of the eyewitness  
29 identification practices and procedures referenced in Section  
30 686.3.

31 SEC. 5. If the Commission on State Mandates determines that  
32 this act contains costs mandated by the state, reimbursement to  
33 local agencies and school districts for those costs shall be made  
34 pursuant to Part 7 (commencing with Section 17500) of Division  
35 4 of Title 2 of the Government Code.